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In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES L. SWISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 14-15) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1978, and a petition for rehearing was denied on October 25, 1978. The petition for a writ of certiorari was filed on November 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is a violation of 18 U.S.C. 1510 to endeavor to cause witnesses to make misrepresentations to Internal Revenue Service agents relating to an IRS investigation concerning violations of a criminal statute.

2. Whether the government was required to prove that petitioner actually knew that his conduct was unlawful.

STATUTE INVOLVED

In pertinent part, 18 U.S.C. 1510(a) provides:

> Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator;
>
> * * * * *
>
> [Shall be punished].

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on six counts of knowingly and willfully endeavoring by means of misrepresentation to obstruct, delay, and prevent the communication of information relating to a violation of a criminal statute to Internal Revenue Service agents, in violation of 18 U.S.C. 1510. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 14-15).

The evidence adduced at trial showed that the IRS was conducting an investigation to determine whether petitioner, an attorney, had attempted to evade federal income taxes, in violation of 26 U.S.C. 7201, during any of the years 1972 through 1975 (App. 28-29).[1] In order to determine whether petitioner accurately reported his income in the years under investigation, the IRS sent a circular letter to petitioner's clients (App. 30-31). The letter stated, in part, that the IRS was conducting an investigation to verify the accuracy of petitioner's income

[1] "App." refers to the pages of the appendix in the court of appeals.

tax returns and requested each client to report to the IRS on a form enclosed with the letter the amount of money paid to petitioner during the years 1973-1975 (App. 253-254).

Petitioner discussed the IRS letter with a number of his clients and told them to provide false information to the IRS. Petitioner asked one client, who had paid him $500 in legal fees, to state on the IRS form that he paid petitioner only $50. The client followed petitioner's instruction (App. 16-17). Petitioner told another client, who had paid him $50, "just to put zeroes down, not to worry about it" (App. 78). The client reported that he paid petitioner nothing and mailed the form to the IRS (App. 79). Petitioner also instructed Winfred Myrick to tell the IRS he paid petitioner nothing, when in fact he paid petitioner $125. Petitioner assured Myrick there was nothing to worry about because there were no receipts establishing the amount actually paid (App. 96).

Similarly, petitioner told Cindy Wyrick, whose husband, James Wyrick, paid petitioner legal fees of $3,000 in 1975 and an undetermined amount in 1974, that if she received a letter from the IRS she should report to them that she and her husband "had not paid [petitioner] a damn penny" (App. 147-149, 153-154). Thereafter petitioner repeated this conversation with Cindy to James Wyrick in a phone call recorded by the IRS with Wyrick's consent. Petitioner also instructed James Wyrick to tell the IRS he paid him nothing. When Wyrick asked if the IRS could find out that he had paid petitioner legal fees, petitioner responded that "you ain't got no receipt and I ain't got no books or nothing showing nothing. So you're alright there" (App. 255-256).

Petitioner, in a phone conversation recorded by the IRS with Francis Wyrick's consent, also told him to tell the IRS that he had paid him nothing during the years under investigation (App. 260-261). In fact he had paid

petitioner $300 or $400 in both 1973 and 1974, and approximately $3,000 in 1975 (App. 205-208). Petitioner assured Francis Wyrick that providing the IRS with false information "can't get [Wyrick] in no jam cause you ain't got no records and I ain't got no records showing nothing. So we're alright" (App. 261).

ARGUMENT

1. a. Petitioner argues (Pet. 6-9, 10-11) that 18 U.S.C. 1510 prohibits a person only from making misrepresentations to witnesses and does not prohibit a person from endeavoring to cause an undeceived witness to make misrepresentations to a criminal investigator.

This contention is without merit. The House Committee Report on Section 1510 leaves no room for doubt on the issue:

> Your committee wishes to make abundantly clear the meaning of the term "misrepresentation" as used in this act. It is our intention that the actual procurement by a party of another party's misrepresentation or silence to a Federal investigator would be covered even though such procurement was not achieved by any misrepresentation. At the same time, it is also our intention that procurement of a witness' communication or silence to a Federal investigator by means of a misrepresentation on the part of the procurer is also covered under the act.

H.R. Rep. No. 658, 90th Cong., 1st Sess. 3 (1967) (hereinafter "House Report"). See also 113 Cong. Rec. 29 (1967).

In view of the above stated legislative purpose, petitioner's willful solicitation of his clients to give false information to the IRS relating to the IRS investigation of petitioner falls squarely within the proscription of 18

U.S.C. 1510.[2] See also *United States* v. *St. Clair*, 552 F. 2d 57, 58 (2d Cir.), cert. denied, 433 U.S. 909 (1977), which held that "[18 U.S.C.] 1510 is violated whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator" even though the individual has not made a misrepresentation to the other person.[3]

b. Petitioner also argues (Pet. 9-10) that Section 1510 does not prohibit a person from making an unsuccessful attempt to induce a witness to make misrepresentations to criminal investigators. This claim is also without merit. The statute prohibits "endeavors by means of * * * misrepresentation * * * to * * * prevent the communication of information * * * ," and the House Report, *supra*, at 3, states that "endeavor"

> * * * means any effort or essay to accomplish the evil purpose that this act is designed to prevent. The use

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[2]Our reliance on the House Report is not, as petitioner claims (Pet. 8), contrary to *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 797 (6th Cir. 1972). In that case, the court refused to rely on a House report which was prepared after the Senate had already voted on a bill, was in "total" disagreement with the Senate report on the bill, and was contrary to the plain meaning of the statute. Here, by contrast, the House Report was consistent with the statutory language and in no way conflicted with an expressed interpretation of the statute by the Senate. See S. Rep. No. 307, 90th Cong., 1st Sess. (1967). Rather, the House Report merely elaborated on a matter about which the Senate was silent; therefore, the House's interpretation is properly considered.

[3]*United States* v. *Cameron*, 460 F. 2d 1394, 1400-1402 (5th Cir. 1972), on which petitioner relies for an alleged conflict (Pet. 7), is inapposite. *Cameron* held that 18 U.S.C. 1510 does not proscribe a defendant's communications to his co-defendant, who was indicted as an accomplice, not to reveal the fact of their joint concealment of stolen money to the FBI. The court reasoned that the co-defendant could not at the same time be the perpetrator and the victim of his own crime. Whether or not *Cameron* was correctly decided, petitioner's clients in this case were not co-defendants or co-perpetrators of his attempted tax evasion.

> of the word "endeavor" avoids the technical difficulties which would be involved by the use of the word "attempt." Thus, where a person's acts have not progressed far enough to amount to an attempt, under the act such acts would come within the scope of the word "endeavor" and thus be subject to punishment.

In accordance with this elucidation of Congress's meaning, it is well established that success of the endeavor is not an essential element of the offense under 18 U.S.C. 1510. See, *e.g.*, *United States* v. *St. Clair, supra,* 552 F. 2d at 58; *United States* v. *Carzoli,* 447 F. 2d 774, 778 (7th Cir. 1971), cert. denied, 404 U.S. 1015 (1972); *United States* v. *Kozak*, 438 F. 1062, 1068 (3d Cir.), cert. denied, 402 U.S. 996 (1971). Cf., *Osborn* v. *United States,* 385 U.S. 323, 333 (1966).

2. Finally, petitioner argues (Pet. 12) that the court improperly rejected his requested jury instruction (App. 263) that the element of willfulness in 18 U.S.C. 1510 requires the government to prove petitioner actually knew "that his conduct was unlawful."

That contention is incorrect. The "willfulness" requirement in Section 1510 requires only that the defendant intended, by means of bribery, misrepresentation, or intimidation, to prevent the communication of information to a criminal investigator—*e.g.*, that he did not do so inadvertently or by means of statements he believed to be true. It does not mean that the government had to prove that he was specifically aware that Section 1510 made his conduct a criminal offense. As this Court stated in *Lambert* v. *California,* 355 U.S. 225, 228 (1957): "The rule that 'ignorance of the law will not excuse' * * * is deep in our law * * *," and that rule applies unless a particular statute makes knowledge of what the law requires a specific element of the offense. See also *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558,

563 (1971); cf. *United States* v. *Feola,* 420 U.S. 671 (1975). Nothing in Section 1510 suggests that knowledge of its prohibitions is an element of the offense.

United States v. *Pomponio,* 429 U.S. 10, 12 (1976), on which petitioner relies, is not to the contrary. There the Court upheld that defendant's conviction for "willfully" making material statements on tax returns which he did "not believe to be true and correct as to every material matter," in violation of 26 U.S.C. 7206(1), and rejected his claim that the jury was erroneously instructed that good motive was not a defense. Indeed, the Court upheld an instruction on willfulness that was identical to the instruction given in this case (App. 278-279); *i.e.*, an act that was done "voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say, with [the] bad purpose either to disobey or to disregard the law." 429 U.S. at 11. *Pomponio* did not overrule the general principle that, unless otherwise specified in the statute or required by its context, the government is not required to prove that the defendant actually knew his conduct was unlawful.[4]

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[4]Although the Court in *Pomponio* stated that "willfulness *in this context* simply means a voluntary, intentional violation of a known legal duty" (429 U.S. at 12; emphasis supplied), it must be remembered that the Court was there considering and rejecting the contention that good motive could excuse the deliberate violation of a known obligation imposed by law. The Court's holding that such a showing would be *sufficient* to establish willfulness by no means amounts to a holding that knowledge of the pertinent statute is always a *necessary* ingredient of willfulness.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys

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